Issue date: 13Feb2002

Case Nos. 2001-BLA-00131 and

2001-BLA-00132

In the Matter of

MARION STACEY, Widow of

EUGENE STACEY, Deceased Miner

Claimant,

v.

CONSOLIDATION COAL COMPANY

Employer,

and

DIRECTOR, OFFICE OF WORKERS'

COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:[(1)]

Barbara Holmes, Esq.

Pittsburgh, Pennsylvania

For the Claimant.

William S. Mattingly, Esq.

Morgantown, West Virginia

For the Employer.

BEFORE: Thomas F. Phalen, Jr.

Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a decision and order arising out of two claims for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, (hereinafter referred to as "the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

On November 6, 2000, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (Dir. Ex. 49)[(2)]

A formal hearing on this matter was conducted on June 12, 2001, in Chillicothe, Ohio, by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and

examine witnesses, to cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:

1. Whether the miner had pneumoconiosis as defined by the Act and regulations;

2. Whether the miner's pneumoconiosis arose out of coal mine employment;

3. Whether the miner's disability was due to pneumoconiosis; and

4. Whether the miner's death was due to pneumoconiosis.

(Dir. Ex. 49)

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT

Procedural History:

The miner, Eugene Stacey, filed an application for Black Lung benefits on August 25, 1997. (Dir. Ex. 1) The claim was denied by a Department of Labor claims examiner on December 24, 1997 for failure to establish the existence of pneumoconiosis, that the disease arose out of his coal mine employment, and that he was totally disabled by pneumoconiosis. (Dir. Ex. 17) The miner submitted additional medical evidence on December 8, 1998. (DX 21) Because the new evidence was submitted within one year of the denial by the claims examiner, the District Director considered it a request for modification under § 725.310. On December 30, 1998, the District Director denied the request for modification on the basis that the evidence still did not establish the existence of pneumoconiosis or that Mr. Stacey's total disability w as due to the disease. (Dir. Ex. 23) On January 22, 1999, the miner requested a formal hearing before an Administrative Law Judge. (Dir. Ex. 24) On April 16, 1999, the claim was transferred to the Office of Administrative Law Judges. (Dir. Ex. 30)

Mr. Stacey died on September 30, 1999. (Dir. Ex. 33) On February 4, 2000, the claim was remanded to the District Director for the filing of a survivor's claim and for association of that claim with the miner's claim. (Dir. EX. 36). Mrs. Stacey filed a survivor's claim on March 3, 2000. (Dir. Ex. 39) The survivor's claim was denied on August 4, 2000, by a Department of Labor claims examiner for failure to establish the existence of pneumoconiosis or that the miner' death was due to pneumoconiosis. (Dir. Ex. 42) On October 3, 2000, Mrs. Stacey requested a formal hearing before an Administrative law Judge on both her claim and the miner's claim. (Dir. Ex. 44) On November 6, 2000, the claims were transferred to the Office of Administrative Law Judges. (Dir. Ex. 49) The undersigned conducted a formal hearing on this matter on June 12, 2001 in Chillicothe, Ohio.

Background:

Mr. Stacey was born on April 14, 1922 and was seventy-seven years old at the time of his death on September 30, 1999. (Dir. Ex. 1, 33) Mr. Stacey completed one year of college. (Dir. Ex. 1) He married Marion Anderson on November 9, 1941, and she remained his only dependent. (Dir. Ex. 1, 5; Tr. 11) Mrs. Anderson was born October 27, 1922, and has no dependents. (Dir. Ex. 1, 39)

Mrs. Stacey testified that for the twenty-one years for which her husband worked for Consolidation Coal Company, he was a master mechanic, maintenance supervisor, in charge of the maintenance of the equipment, and was also known as an electrical engineer. (Tr. 11-12, 22) The parties stipulated, in a discussion off the record, to at least twenty-one years of coal mine employment. (Tr. 26) Mr. Stacey worked underground most of the time, and he last worked in Bluefield, West Virginia. (Tr. 13-14) Mr. Stacey stopped work as a coal miner in 1979 but continued to work for a division of Consolidation Coal Company until 1984, when he was sixty-two and entitled to a company pension and Social Security. (Tr. 14-15)

Mrs. Stacey testified that the miner was on oxygen, prescribed by Dr. Keller in Illinois, for 22-24 hours a day for the last two years of his life. (Tr. 16-17) Mr. Stacey also treated with Dr. Hillard and Dr. Cummin, a general practitioner who treated the miner until the time of his death. (Tr. 17) Mrs. Stacey explained that just prior to the miner's death, he had fallen and was taken to the hospital where they failed to put him on oxygen. (Tr. 18) He slipped into a coma until he was given oxygen. He was awake for about a day and then went into a coma again.

Mrs. Stacey testified that her husband had smoked since he was in high school but quit several months before his death. (Tr. 19-20) She believed that he did not smoke over a pack or a pack and a half of cigarettes a day. (Tr. 24) This is consistent with the miner's answers to interrogatories, in which he wrote that he smoked one to one and one-half packs of cigarettes per day beginning in 1940 and lasting about 60 years, although he cut down to one to two cigarettes a day when he went on oxygen. (Dir. Ex. 31 @ 14) Mrs. Stacey observed that he had to give up square dancing in the 1970s because of shortness of breath and that he had trouble catching his breath in the morning sometimes, a problem which was sometimes aided by a cigarette. (Tr. 20) He had to give up walking but was still able to drive a car. (Tr. 21)

MEDICAL EVIDENCE

Chest X-rays:

X-ray Date Exhibit Number Physician Qualifications Reading

10-11-1972 Dir. Ex. 28 @ 8 Dr. Kelly No evidence of pleural disease; no change in the appearance of this chest since the previous study of 8/31/71

04-16-1974 Dir. Ex. 28 @ 9 Dr. Crozier Essentially negative chest; there is a small healed granuloma in the left base; appearances are unchanged since the 10/11/72 exam

05-??-19?? Dir. Ex. 28 @ 10 Dr. Huot R[(3)] Calcified nodes are seen at the left hilum and a small calcified nodule is demonstrated in the left posterior sulcus; no significant abnormality in lung fields

04-20-1976 Dir. Ex. 28 @ 11 Dr. Huot R Small, round calcified granuloma seen at the left base, but no significant abnormality is demonstrated in the lung fields and there is no change in appearance of the chest since the previous exam

04-27-1977 Dir. Ex. 28 @ 12 Dr. Huot R Small calcified granuloma is seen posterior of the left leaf of the diaphragm; no other abnormality is demonstrated in the lung fields; there is no change in the appearance of the chest since the previous exam

04-10-1978 Dir. Ex. 28 @ 13 Dr. Huot R Small, round calcified granuloma is noted in the posterior sulcus at the left base; no other abnormality is demonstrated in the lung fields, and there is no change in the appearance of the chest since the previous examination

10-14-1997 Dir. Ex. 15 Dr. Darwin R Chronic obstructive pulmonary disease; faint nodular density noted at each lung base; would suspect that this represents focal bulging of the diaphragm but comparison with old films or chest CT would be helpful to rule out lung nodules

10-14-1997 Dir. Ex. 16 Dr. Kattan B[(4)], R No parenchymal abnormalities consistent with pneumoconiosis; emphysema

10-14-1997 Dir. Ex. 37 Dr. Fino B; I[(5)] No changes consistent with a coal mine dust associated occupational lung disease

01-19-1998 Dir. Ex. 28 @ 14 Dr. Farneman Chronic obstructive pulmonary disease

04-29-1999 Dir. Ex. 37 @ 20 Dr. Spitz B, R No evidence of coal workers' pneumoconiosis; probable emphysema

Pulmonary Function Tests:

Ex. Age/

Date No. Height FEV_1[(6)] FVC[(7)] MVV[(8)] Valid Qualifies

10-14-1997 Dir. Ex. 11 75/71" 0.81 2.64 24.86 yes yes

Interpretation: Decrease in the expiratory flow rates with FEV1/FVC ratio of 31%.

Found acceptable by Dr. Sarah Long on November 4, 1997. (Dir. Ex. 12)

04-29-1999 Emp. Ex. 4 77/71" 0.62 2.04 --- --- yes

Arterial Blood Gas Studies:

At Rest/

Test Date Exhibit Number pCO_2 pO_2 Qualifies After Exercise

10-14-1997 Dir. Ex. 14 47.4 67.5 no At Rest

11-02-1998 Dir. Ex. 21 52.8 56.7 yes At rest

04-29-1999 Emp. Ex. 4 53 56 yes At rest

Medical Opinions:

On October 14, 1997, Dr. Mohammed Shareef examined Mr. Stacey. (Dir. Ex. 13) He considered 32 years of coal mine employment, lastly as a maintenance manager, a history of smoking less than one pack of cigarettes a day for 57 years, a history of wheezing and a heart attack, complaints of a productive cough for 20 years and shortness of breath, an x-ray, a pulmonary function study, a blood gas study, and a physical examination. Based thereon, Dr. Shareef diagnosed chronic obstructive pulmonary disease due to smoking and coal dust exposure, and coronary artery disease due to atherosclerosis. He opined that the COPD severely impaired Mr. Stacey, while the coronary artery disease moderately impaired him. Although Dr. Shareef did not specify that the miner was totally disabled, he apportioned his disability 60% to the COPD and 40% to the coronary artery disease. Dr. Shareef is board certified in internal medicine and pulmonary diseases.

Mr. Stacey's treating physician, Dr. David L. Cummin, submitted treatment records from August 28, 1997 through January 25, 1999. (Dir. Ex. 28) On physical examination, he noted distant breath sounds and continued Mr. Stacey on oxygen and an inhaler. Dr. Cummin noted the miner's Alzheimer's symptoms and also diagnosed a history of myocardial infarction, chronic obstructive pulmonary disease, coronary artery disease, and probable depression. During the March 4, 1998 examination, Dr. Cummin noted that Mr. Stacey had clear lungs and no shortness of breath. Notes from July 28, 1998 show that Mr. Stacey's father died from emphysema and a myocardial infarction. It also evinced a 60-pack-year smoking history with the miner's continuing to smoke two to four cigarettes per day.

Dr. Cummin was deposed on September 10, 1999. (Dir. EX 46) He provided his qualifications as being board certified in family practice. He stated that he began treating Mr. Stacey on August 28, 1997, after the miner had moved to Ohio from Illinois. He explained that he did not initially diagnose Mr. Stacey with chronic obstructive pulmonary disease, but he did follow him for the condition based on Dr. Shareef's testing. He felt that both the miner's 33 years of coal mining and 60 years of smoking contributed to the COPD. Dr. Cummin did not feel that the miner's smoking history alone could have

caused the extent of his disease, requiring home oxygen. Dr. Cummin made it clear that his experience with pneumoconiosis is extremely limited. He has had experience with only 20-30 patients with coal workers' pneumoconiosis. He did not know how frequently coal miners with pneumoconiosis have pulmonary impairment arising from the disease. Dr. Cummin testified that he was not qualified to diagnose pneumoconiosis; he simply continued to care for Mr. Stacey after he'd been so diagnosed by Dr. Shareef. He did not know if steroidal inhalers are effective against airway diseases caused by coal dust exposure. Dr. Cummin opined that Mr. Stacey had a disabling lung disease which he felt was due in part to coal mine dust exposure. He based his opinion on the coal mine employment history and the opinion of Dr. Shareef.

Dr. Herbert A. Grodner examined Mr. Stacey on April 29, 1999. (Dir. Ex. 37 @ 12) He considered 33 years of coal mine employment, primarily as a master mechanic/electrician, maintenance engineer, and superintendent; a history of shortness of breath and a productive cough; a history of a heart attack and angioplasty; and a history of smoking one pack of cigarettes a day for many years before quitting just two to three months before the examination. Physical examination revealed a decrease in the intensity of breath sounds and decreased ventilatory excursion. He further weighed the results of an x-ray, EKG, pulmonary function study, and blood gas study. Dr. Grodner also reviewed the October 14, 1997 x-ray report, pulmonary function study, and blood gas study. He did not find sufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. Rather, Dr. Grodner diagnosed severe chronic obstructive pulmonary disease. He found Mr. Stacey totally disabled from returning to coal mining work and expressed that the disability was due to his cigarette smoking and not pneumoconiosis. Dr. Grodner is board certified in internal medicine and pulmonary disease. (Dir. Ex. 37 @ 19)

Dr. Gregory J. Fino reviewed medical evidence on July 6, 1999. (Dir. Ex. 37 @ 21) He considered 33 years of coal mine employment as a master mechanic and superintendent and field representative, ten x-ray readings of nine x-rays taken between October 1972 and April 1999, the October 14, 1997 pulmonary function study, three blood gas studies, and the records or reports of Drs. Cummin, Shareef, and Grodner. Dr. Fino found the objective medical evidence insufficient to justify a diagnosis of coal workers' pneumoconiosis. He also did not find an occupationally acquired pulmonary condition. While Dr. Fino asserted that Mr. Stacey had a totally disabling respiratory impairment, he opined that it was due to smoking. He added that even if the miner were found to suffer from pneumoconiosis, his opinions as to etiology and degree of impairment would not change.

Mr. Stacey died on September 30, 1999. The death certificate lists the cause of death as cardiogenic shock due to acute myocardial infarction as a consequence of coronary artery disease. (Dir. Ex. 33) Dr. Cummin, who completed the death certificate, also listed chronic obstructive pulmonary disease, a right hip fracture, Alzheimer's disease, and depression as other significant conditions contributing to the miner's death but not resulting in the underlying cause of death.

Dr. Byron D. Smith performed a partial autopsy, limited to the lungs, on October 1, 1999. (Dir. Ex. 37 @ 62) Dr. Smith's report includes a gross description only, in which he saw marked anthracotic pigmentation and evidence of extensive severe emphysema. He opined that Mr. Stacey died of terminal chronic obstructive lung disease given the severe emphysema present. While he did not detect the "classic patterns of anthracosilicosis with massive fibrosis," he added that such is characteristically seen in "hard coal miners." Dr. Smith is board certified in anatomic and clinical pathology.

Dr. Joseph F. Tomashefski reviewed medical evidence, including the twelve autopsy slides, on January 21, 2000. (Dir. Ex. 37 @ 36) Dr. Tomashefski also considered the death certificate, autopsy report, an accurate employment history, the records and reports of Drs. Cummin, Grodner, and Fino and the smoking histories provided to these physicians, the October 14, 1997 pulmonary function study, x-ray reports between October 1972 and April 1999, and two blood gas studies. Dr. Tomashefski did not see evidence of coal workers' pneumoconiosis. Specifically, he stated that the focal interstitial fibrosis seen on the lung tissue slides was minimal and did not conform to the pattern of the disease. He opined that Mr. Stacey had severe, end-stage panacinar emphysema due to cigarette smoking. Dr. Tomashefski felt that the immediate cause of death was acute necrotizing pneumonia.

Dr. Tomashefski was deposed on April 26, 2001. (Emp. Ex. 3) He provided his credentials as being board certified in anatomic and clinical pathology and chairman of the department of pathology at his hospital. (Dir. Ex. 37 @ 40) He has focused his career in the area of pulmonary pathology. In addition to referring to his prior report, Dr. Tomashefski also reviewed the February 15, 2001 letter of Dr. Smith. Because the data he reviewed included clinical reports from treating physicians and consultants, the results of x-rays and pulmonary function studies, and the autopsy report and slides, Dr. Tomashefski felt it was sufficient to allow him to reach a conclusion about the existence of pneumoconiosis and disability as well as the cause of death. Dr. Tomashefski pointed to many factors as supportive of his opinion that death was due to severe acute

pneumonia in the end stage of emphysema: the miner's history of wheezing, dyspnea on exertion, cough and sputum production; the use of oxygen; x-ray readings of hyperinflation; a very low FEV1 and FEV1 to FVC ratio; increased lung volume; decreased diffusion capacity; hypoxemia, respiratory acidosis, and hypercarbia; and the finding of diffuse enlargement of air spaces with evidence of alveolar wall destruction by autopsy.

Dr. Tomashefski pointed out problems with Dr. Smith's autopsy report, such as the lack of a microscopic description or autopsy diagnoses or cause of death. Dr. Tomashefski explained that lesions which appear grossly to be due to coal workers' pneumoconiosis must be confirmed microscopically. He further explained that the finding of black pigment can represent either coal dust or cigarette-related pigment. Dr. Tomashefski opined that panacinar emphysema is due to cigarette smoke. The emphysema prevented Mr. Stacey from being able to clear his secretions, making him more susceptible to infection and, thus, predisposing him to pneumonia. He believed this pulmonary impairment would have left Mr. Stacey totally disabled during his lifetime and was the underlying cause of his death. Dr. Tomashefski relied on the smoking histories set forth in the reports he reviewed and opined that even if Mr. Stacey had ceased smoking in 1997, it would not affect his opinion.

Dr. Stephen T. Bush provided a consultation report dated February 22, 2000. (Dir. Ex. 41) He reviewed eight x-ray reports between 1974 and 1999, the records of Dr. Cummin, two pulmonary function studies, the reports of Drs. Fino, Tomashefski, Shareef, and Grodner, the autopsy report, death certificate, and 12 histologic slides from the autopsy. He opined that the x-ray evidence did not indicate the presence of pneumoconiosis but did establish the existence of chronic obstructive pulmonary disease. Dr. Bush did not diagnose pneumoconiosis or any dust disease related to coal mine employment. He did not find any coal micronodules or interstitial fibrosis associated with dust. Rather, he felt the lungs showed marked alteration in architecture by severe diffuse centrilobular emphysema typical of cigarette smokers, and acute severe, bronchopneumonia. Dr. Bush opined that any respiratory impairment would not have been the result of coal dust inhalation. He stated that death was caused by severe diffuse acute bronchopneumonia associated with centrilobular emphysema, and not at all related to the miner's coal mine employment. Dr. Bush is board certified in anatomic and clinical pathology.

Dr. Smith reviewed the opinions of Drs. Bush and Tomashefski on February 15, 2001. (Emp. Ex. 1) He again reviewed slides of lung tissue. He still did not find anthracosilicosis but did agree with the finding of panemphysema with complicating pneumonia. Dr. Smith admitted that he was not an expert in occupational lung disease and agreed with the opinions of Drs. Bush and Tomashefski.

Dr. Fino reviewed additional evidence on February 28, 2001. (Emp. Ex. 2) He considered Dr. Darwin's reading of the October 14, 1997 x-ray, Dr. Spitz's reading of the April 29, 1999 x-ray, the death certificate, Dr. Smith's letter, and the pathology reviews by Drs. Tomashefski and Bush. Dr. Fino opined that there was no objective evidence that lung disease caused Mr. Stacey's death. Due to the limited scope of the autopsy, Dr. Fino felt he could only speculate as to the cause of death and that it would be unreasonable to attribute death due to terminal chronic obstructive lung disease. Rather, Dr. Fino averred that there was no evidence that Mr. Stacey's death was caused, contributed to, or hastened by any chronic dust disease of the lungs arising out of coal mine employment.

Dr. Fino was deposed on June 8, 2001. (Emp. Ex. 5) He provided his qualifications as being board certified in internal medicine and pulmonary disease, as well as a B-reader. (Dir. Ex. 37 @ 5) Dr. Fino reiterated the results of his review and supplemental review of the medical evidence. Dr. Fino disagreed with Dr. Cummin's opinion that the miner's 60-pack-year smoking history would not likely cause a severe airway obstruction. He added that even a 20-pack-year history often leads to severe airway obstruction. Dr. Fino pointed out that Mr. Stacey's prescription for an inhaled bronchodilator was for a reversible airway obstruction that would be consistent with smoking but not pneumoconiosis, which is not reversible. Based on the pulmonary function studies' revealing a markedly reduced diffusing, combined with the lack of radiographic evidence of pneumoconiosis, Dr. Fino was able to diagnose emphysema due to smoking. He stated that the April 29, 1999 x-ray revealed the hallmarks of emphysema: flattening of the diaphragm and an increase in the front to back diameter. Furthermore, the fact that the miner's pO2 continued to lower as the pCO2 rose was another indication of

emphysema. Finally, Dr. Fino testified that because neither the x-rays nor the autopsy revealed coal mine dust or disease therefrom, he could not attribute the emphysema to coal mine employment.

DISCUSSION

Miner's Modification Claim

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. § 932(a) and as implemented by § 725.310, provides that upon a miner's own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or a denial of benefits. § 725.310(a).

In deciding whether a mistake in fact has occurred, the United States Supreme Court stated that the Administrative Law Judge has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Furthermore, the Fourth Circuit Court of Appeals, under whose appellate jurisdiction this case arises,[(9)] stated that a modification request need not specify any factual error or change in conditions. *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993). Rather, Claimant may merely allege that the ultimate fact, total disability from pneumoconiosis arising out of coal mine employment, was incorrectly decided. *Id.* Additionally, the court stated that the Administrative Law Judge has the duty to reconsider all the evidence for a mistake of fact or a change in conditions. *Id.*

In determining whether a change in conditions has occurred requiring modification of the prior denial, the Benefits Review Board ("Board") similarly stated that,

the Administrative Law Judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision.

Kingery v. Hunt Branch Coal Co., BRB No. 92-1418 BLA (Nov. 22, 1994); *See also Napier v. Director, OWCP*, 17 B.L.R. 1-111 (1993); *Nataloni v. Director, OWCP*, 17 B.L.R. 1-82 (1993). Furthermore,

if the newly submitted evidence is sufficient to establish modification . . ., the Administrative Law Judge must consider all of the evidence of record to determine whether Claimant has established entitlement to benefits on the merits of the claim.

Kovac v. BNCR Mining Corp., 14 B.L.R. 1-156 (1990), *modified on recon.*, 16 B.L.R. 1-71 (1992).

In the prior denial, the claims examiner found that the miner failed to establish the existence of pneumoconiosis arising out of coal mine employment and that his total disability was due to pneumoconiosis. In accordance with the above precedent, I will review the newly submitted evidence, in conjunction with prior evidence, to determine whether such evidence establishes that claimant suffers from pneumoconiosis and that his totally disabling respiratory condition is due to pneumoconiosis. These elements were previously adjudicated against claimant in the prior denial of benefits. If either one is established, I will consider all the evidence of record to determine whether he is entitled to benefits. In addition, the entire record will be reviewed to determine whether a mistake in the determination of a fact occurred in a prior denial of benefits.

Pneumoconiosis:

Section 718.202(a) sets forth four methods by which a claimant may establish the existence of pneumoconiosis under this part of he regulations. Under § 718.202(a)(1), a chest x-ray conducted and classified in accordance with § 718.102 may form the basis for a finding of the existence of pneumoconiosis.

There are eleven readings of nine separate x-rays. None was read as positive for pneumoconiosis. I am especially persuaded by the x-rays taken since October 14, 1997. That film was found negative by Dr. Kattan, who is a B-reader and board certified radiologist, and Drs. Darwin and Fino, both B-readers. Furthermore, Dr. Spitz, a dually certified reader, interpreted the April 29, 1999 x-ray as negative. I defer to their superior credentials. *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Accordingly, I find that the newly submitted evidence does not establish the existence of pneumoconiosis under §718.202(a)(1). When the newly submitted evidence is considered in conjunction with all the prior x-ray evidence, it also fails to establish the existence of pneumoconiosis.

A biopsy or autopsy conducted and reported in compliance with §718.106 may also be the basis for finding the existence of pneumoconiosis. §718.202(a)(2). While no biopsy was performed, a partial autopsy, limited to the lungs, was performed.

Dr. Smith, who performed the limited autopsy, failed to perform a microscopic examination, as required by Section 718.106(a), but found anthracotic pigmentation. He did not see the classic pattern of anthracosilicosis with massive fibrosis. Dr. Tomashefski reviewed the autopsy slides and opined that the slides showed emphysema but not pneumoconiosis. He added that the interstitial fibrosis was minimal and not consistent with pneumoconiosis. He additionally stated that black pigmentation can be the result of cigarette smoking. Dr. Bush felt the autopsy slides showed chronic obstructive pulmonary disease but not pneumoconiosis.

I place little weight on Dr. Smith's findings because he did not perform a microscopic examination of the lung tissue, thereby not only severely limiting his ability to make a diagnosis, but also violating the regulatory standards governing autopsy evidence. Drs. Tomashefski and Bush had the opportunity to visualize the tissue under a microscope, and I find that this provided them with a better basis for drawing a conclusion. Furthermore, both physicians are board certified pathologists, and I defer to their expertise. *Scott v. Mason Coal Co.*, 14 BLR 1-38 (1990). I am also influenced by the fact that they independently came to the same conclusions. They did not see coal micronodules, and both found that the tissue exhibited the classic pattern of emphysema caused by cigarette smoking. Similarly, Dr. Smith found severe emphysema and did not detect the "classic patterns of anthracosilicosis with massive fibrosis." Thus, even his report supports the conclusions of Drs. Tomashefski and Bush. Consequently, I find that

the claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2).

Section 718.202(a)(3) provides that it shall be presumed that a miner is suffering from pneumoconiosis if the presumptions described in §§ 718.304, 718.305 or 718.306 are applicable. No x-ray evidence of complicated pneumoconiosis is present in the record, thus § 718.034 does not apply. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, § 718.306 is not relevant because it is only applicable to claims of deceased miners who died on or prior to March 1, 1978.

The fourth and final way to establish the existence of pneumoconiosis is set forth in § 718.202(a)(4). This subsection provides for such a finding where a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis. Any such finding shall be based upon objective medical evidence and shall be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which bases his diagnosis. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

Dr. Shareef diagnosed chronic obstructive pulmonary disease due to smoking and coal dust employment, and this is sufficient to constitute a diagnosis of pneumoconiosis. Dr. Cummin made the same diagnosis, deferring to Dr. Shareef's finding. Drs. Grodner, Bush, Tomashefski, and Fino did not find the existence of pneumoconiosis.

All the opinions are well documented and thus entitled to some weight. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). However, I place less weight on Dr. Cummin's opinion because he treated Mr. Stacey for less than a year and a half for a total of 14 times, and the extent of his treatment was limited to maintaining him on drugs prescribed by another physician. Section 718.104(d). Furthermore, Dr. Cummin himself admitted that he was not qualified to diagnose pneumoconiosis because he had no expertise in the area. He clearly stated that his diagnosis came from Dr. Shareef's. Dr. Shareef's opinion merits more weight because it is well documented and he is board certified in internal medicine and pulmonary diseases. *Scott v. Mason Coal Co.*, 14 BLR 1-38 (1990). The only factors

detracting from Dr. Shareef's opinion are the x-ray evidence and the remaining medical opinions. Not only was the x-ray that he ordered interpreted as negative, but every x-ray of evidence was found negative for pneumoconiosis.

Drs. Grodner and Fino are both board certified in internal medicine and pulmonary diseases. Drs. Tomashefski and Bush are both board certified in pathology. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Dr. Grodner had the opportunity to not only examine the miner but also review additional medical evidence, thereby providing him with a broad base from which to draw his conclusions. Drs. Bush, Tomashefski, and Fino based their opinions of a review of the medical evidence, with Drs. Bush and Tomashefski basing their opinions on their visualization of lung tissue. The opinions of these physicians are also supported by the x-ray evidence. Consequently, I find the opinions of Drs. Grodner, Fino, Tomashefski, and Bush more persuasive than Dr. Shareef's. I further find that the evidence, when viewed in its entirety, fails to establish the existence of pneumoconiosis pursuant to § 718.202(a)(4). Moreover, consideration of all the evidence under Section 718.202 also leads to the conclusion that the claimant has failed to establish the existence of pneumoconiosis by a preponderance of the evidence. *Island Creek Coal Co. v. Compton*, ___ F.3d ___, 2000 WL 524798 (4th Cir. 2000).

Pneumoconiosis Arising Out Of Coal Mine Employment:

Assuming, *arguendo*, the claimant established the existence of pneumoconiosis, he must still prove that his pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a). For a miner who suffers from pneumoconiosis and was employed for ten or more years in one or more coal mines, it is presumed that his pneumoconiosis arouse out of his coal mine employment. (*Id.*) Because I have accepted the parties' stipulation that the claimant worked for 21 years in coal mine employment, Mr. Stacey is entitled to the rebuttable presumption that his pneumoconiosis, if he had it, arose out of coal mine employment.

Total Disability:

The parties stipulated that Mr. Stacey was totally disabled during his lifetime. (Tr. 27)

I note that this stipulation is bolstered by the two pulmonary function studies of record, both of which produced qualifying values, and the blood gas studies of record, the two most recent of which yielded qualifying results. Section 718.204(b)(2)(i) and (ii). Therefore, I accept the parties' stipulation that Mr. Stacey was totally disabled.

Total Disability Due to Pneumoconiosis:

The Fourth Circuit, under whose jurisdiction this claim arises, requires that pneumoconiosis be a "contributing cause" to the miner's total disability. *Hobbs v. Clinchfield Coal Co*., 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). In *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994), the Fourth Circuit concluded that "nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis." Rather, the miner must demonstrate that he had "a totally disabling respiratory or pulmonary condition . . . and show that his pneumoconiosis is a contributing cause to this total disability."

In *Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4th Cir. 1998), the court concluded that the administrative law judge erred in stating that, even if a miner's cardiac condition was the primary cause of his total disability, it was not the exclusive cause. Citing to *Street*, 42 F.3d at 243, the court "rejected the argument that '[a] miner need only establish that he has a total disability, which may be due to pneumoconiosis in combination with nonrespiratory and nonpulmonary impairments.'" Thus, the court held that even if it is determined that the miner suffered from a totally disabling respiratory condition, he "will not be eligible for benefits if he would have been totally disabled to the same degree because of his other health problems."

Medical opinion evidence is the only method available for a claimant to prove total disability due to pneumoconiosis. *See Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987).

Dr. Shareef opined that Mr. Stacey's disability was 60% due to his chronic obstructive pulmonary disease which he attributed in part to coal dust exposure. Dr. Cummin felt that the miner's disabling lung disease was due in part to coal mine dust exposure based on the miner's employment history and Dr. Shareef's opinion. Drs. Grodner, Bush, Tomashefski, and Fino attributed Mr. Stacey's total disability to cigarette smoking and not pneumoconiosis.

I first note that Drs. Shareef, Grodner, and Fino are board certified in internal medicine and pulmonary disease. Drs. Smith, Tomashefski, and Bush are board certified pathologists, with Dr. Tomashefski's career focusing on pulmonary pathology. Therefore, their opinions are all entitled to deference because of the superior credentials. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). While Dr. Cummin is board certified in family practice, he admitted to his lack of expertise in the field of pulmonary medicine, particularly involving pneumoconiosis, and even asserted that he was not qualified to give an opinion in this matter. Thus, I place less weight on his opinion.

Dr. Shareef's opinion is well reasoned given Mr. Stacey's extensive smoking and coal mine employment histories. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). However, he, unlike Drs. Grodner, Tomashefski, Bush, and Fino, did not provide a detailed explanation for his opinion. I place the greatest weight on the opinions of Drs. Bush and Tomashefski because they are based on microscopic examinations of the miner's lung tissue. Both pathologists were confident that given the alteration in the lungs' architecture, any impairment was due to emphysema caused by smoking and not pneumoconiosis. Dr. Smith deposed that he concurred with the opinions of Drs. Bush and Tomashefski. I also place weight on Dr. Fino's opinion because of his thorough review of the medical evidence in reaching his conclusion. Accordingly, I find that Mr. Stacey failed to establish that pneumoconiosis was a contributing cause to his disability.

Death Due to Pneumoconiosis:

In order to be eligible for benefits, Mrs. Stacey must prove that her husband's death was caused by pneumoconiosis. The Fourth Circuit has held that benefits are awarded to a survivor who establishes that pneumoconiosis is a substantially contributing cause or factor leading to the miner's death if it serves to hasten that death in any way. *Shuff v. Cedar Coal Co.*, 967 F.2d 977 (4th Cir. 1992); Section 718.205(c)(5). Survivors are not eligible for benefits where the miner's death was caused by a traumatic injury, or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death. § 718.205(c)(4); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). In order to recover benefits, Mrs. Stacey must prove that the miner had pneumoconiosis, that the

disease arose out of coal mine employment, and that pneumoconiosis hastened her husband's death in some manner. Section 718.205(a)(1)-(3). Of course, because I have already found that the evidence fails to establish the existence of pneumoconiosis, Mrs. Stacey cannot prove that the disease hastened her husband's death. Still, I will analyze the evidence under the proper standard.

Dr. Cummin attributed death to cardiogenic shock due to acute myocardial infarction as a consequence of coronary artery disease. He listed chronic obstructive pulmonary disease as a significant condition contributing to death but not resulting in its underlying cause. Dr. Smith did not provide an opinion as to cause of death but did agree with the findings of Drs. Bush and Tomashefski. Dr. Bush attributed death to severe diffuse acute bronchopneumonia associated with centrilobular emphysema. He did not relate it to coal mine employment at all. Dr. Tomashefski felt that death was due to acute necrotizing pneumonia as a result of end-stage emphysema. Dr. Fino testified that he had inadequate evidence to provide a reasoned opinion as to the cause of death but stated that based on the evidence before him, there was no reason to believe that death was hastened by chronic dust disease arising out of coal mine employment.

I place greatest weight on the opinions of Drs. Bush and Tomashefski because of their expertise as pathologists and because they alone viewed the autopsy slides of the lung tissue. They each also reviewed other medical evidence of record, thereby providing them with the clearest picture of Mr. Stacey's health and final condition. Their conclusions are consonant with their microscopic findings. I am especially persuaded by Dr. Tomashefski's cogent explanation pointing to the factors supporting his opinion that death was due to pneumonia and not pneumoconiosis: the miner's history of wheezing, dyspnea on exertion, cough and sputum production; the use of oxygen; x-ray readings of hyperinflation; a very low FEV1 and FEV1 to FVC ratio; increased lung volume; decreased diffusion capacity; hypoxemia, respiratory acidosis, and hypercarbia; and the finding of diffuse enlargement of air spaces with evidence of alveolar wall destruction. By comparison, Dr. Cummin's inclusion of chronic obstructive pulmonary disease as a significant condition contributing to death lacked an etiology of the COPD. It was not until he was later deposed that he testified that the COPD was due at least in part to coal mine employment, and at that he admitted that the basis for his attribution was Dr. Shareef's opinion, not his own expertise. Furthermore, Dr. Cummin did not have the advantage of a review of all the medical evidence or, especially, lung tissue from the autopsy. Rather, he relied on his observations of the claimant over his 17 months of treating the miner and his final course in the hospital. Comparatively, I find the opinions of Drs. Tomashefski and Bush much more reliable and persuasive. Consequently, I find that Mrs. Stacey has failed to establish that pneumoconiosis hastened her husband's death.

Entitlement:

As the claimant miner has failed to show a change in condition or a mistake in a determination of fact, I find that he is not entitled to benefits under the Act. Furthermore, as the claimant widow has failed to establish that her husband's death was due to pneumoconiosis, I find that she is not entitled to benefits under the Act.

Attorney's Fees:

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Because the benefits are not awarded in this case, the Act prohibits the charging of any attorneys' fee to the claimant for legal services rendered in pursuit of benefits.

ORDER

It is therefore ORDERED that the claims of Marion Stacey and Eugene Stacey for benefits under the Act are DENIED.

A

THOMAS F. PHALEN, JR.

Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. **A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2605, 200 Constitution Avenue, NW, Washington, D.C. 20210.**

1. The Director, Office of Workers' Compensation Programs, was not present or represented at the hearing.

2. In this Decision, "Dir. Ex." refers to the Director's Exhibits, "Emp. Ex." refers to the Employer's Exhibits, "ALJX" refers to the Administrative Law Judge's Exhibits, and "Tr." refers to the official transcript of this proceeding.

3. Board-certified in radiology.

4. A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. Physicians' qualifications are a matter of public record at the HHS National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.51) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

5. Board-certified in internal medicine with a sub-specialty in pulmonary diseases.

6. **Forced expiratory volume in one second.**

7. Forced vital capacity.

8. Maximum voluntary ventilation.

9. The Benefits Review Board has held that the law of the circuit in which the claimant's last coal mine employment occurred is controlling. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989). The claimant's last coal mine employment took place in West Virginia, which falls under the Fourth Circuit's jurisdiction.